IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TODD A. D'ANTONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

10-cv-675-wmc

Petitioner Todd A. D'Antoni has filed a motion under 28 U.S.C. § 2255, seeking to vacate, set aside or correct the sentence that he received on April 2, 1991. The government has filed a brief in opposition, arguing that review should be denied because the motion is barred by the one-year statute of limitations. (Dkt. #2.) D'Antoni has filed a reply. (Dkt. #3.) Because the motion is untimely, this case will be dismissed for reasons set forth below.

FACTS

D'Antoni is presently in the custody of the United States Bureau of Prisons at the Federal Correctional Institution in Pekin, Illinois, as the result of a conviction entered against him in *United States v. D'Antoni*, Case No. 90-cr-92-jcs (W.D. Wis.). D'Antoni was charged in that case with conspiracy to violate 21 U.S.C. § 841 by possessing and agreeing to distribute a controlled substance, lysergic acid diethylamide (LSD). During the trial of that case, the government presented evidence showing that D'Antoni orchestrated a scheme to import and distribute LSD inside the Federal Correctional Institution in Oxford, Wisconsin (FCI-Oxford), where he was incarcerated as the result of

a prior offense. A jury found D'Antoni guilty of the conspiracy and drug possession charges on February 5, 1991.

According to the presentence report (PSR) prepared by the probation office, D'Antoni faced an enhanced statutory maximum penalty of 30 years in prison under 21 U.S.C. § 841(b)(1)(C) because he had a prior federal conviction for a drug offense. In addition, D'Antoni qualified for the career-offender enhancement found in § 4B1.1 of the United States Sentencing Guidelines because, at the time the charged offense occurred in 1990, D'Antoni already had prior federal convictions for distribution of cocaine and for conspiracy to kill a government witness. D'Antoni pled guilty on October 31, 1987, to charges of distributing cocaine to a fifteen-year-old girl, who died from the use of that controlled substance. *See United States v. D'Antoni*, Case No. 87-cr-61-jcs. On that same date, D'Antoni pled guilty to charges in a separate case accusing him of conspiring to kill the government's main witness against him in the cocaine distribution case. *See United States v. D'Antoni*, Case No. 87-cr-96-jcs. D'Antoni faced a potential range of 262 to 327 months in prison as a career offender under Guideline § 4B1.1. The sentencing court found that D'Antoni was a career offender and, on April 2, 1991, imposed a term of 264 months (22 years) in prison.

On direct appeal, D'Antoni challenged the sentencing court's finding that he was a career offender under § 4B1.1. The Seventh Circuit concluded that D'Antoni was classified appropriately as a career offender and affirmed the sentence in an unpublished opinion. *See United States v. D'Antoni*, No. 91-1856, 1992 WL 357229 (7th Cir. Dec. 3,

1992). D'Antoni did not pursue a petition for a writ of certiorari with the United States Supreme Court and his conviction became final in 1993.

On October 19, 2010, D'Antoni moved for relief from his sentence under 28 U.S.C. § 2255. D'Antoni's sole argument is that the government failed to comply with notice requirements found in the Controlled Substances Act, codified as amended at 21 U.S.C. § 851(a), by advising him that his sentence could be enhanced with his prior drug conviction. That section provides that:

> No person who stands convicted of an offense [under the Controlled Substances Act] shall be sentenced to increased punishment by reason of one or more prior convictions unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1).

Arguing that he did not receive adequate notice, D'Antoni maintains that his prison sentence could not exceed the statutory maximum of 20 years under 21 U.S.C. § 841(b)(1)(C). D'Antoni insists, therefore, that he is entitled to relief from the 264-month sentence imposed on April 2, 1991. In response to D'Antoni's motion, the government argues that review is barred by the one-year statute of limitations found in 28 U.S.C. § 2255(f)(1), which begins to run when a federal defendant's conviction becomes "final."

OPINION

A motion for relief under 28 U.S.C. § 2255 invokes "an extraordinary remedy because it asks the district court essentially to reopen the criminal process to a person

who already has had an opportunity for full process." *Almonacid v. United* States, 476 F.3d 518, 520 (7th Cir. 2007) (citing *Kafo v. United States*, 467 F.3d 1063, 1068 (7th Cir. 2006)). There are significant procedural hurdles that limit a criminal defendant's ability to seek collateral review under § 2255. One such hurdle imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), is the one-year statute of limitations found in 28 U.S.C. § 2255(f). This one-year period begins to run from the latest of the following alternatives:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

The question here is when the statute of limitations began to run with respect to D'Antoni's claim. As noted above, D'Antoni's primary claim is that he was not afforded notice as required by 21 U.S.C. § 851(a), regarding the enhanced statutory range of punishment that applied as the result of his prior drug offense. As D'Antoni concedes,

this statute was in effect at the time his conviction was entered in 1991.[1] Under these circumstances, a defendant ordinarily must seek relief under § 2255(f)(1), within one year of "the date on which the judgment of conviction becomes final."

The Seventh Circuit affirmed D'Antoni's conviction on December 3, 1992. Because D'Antoni did not appeal further to the Supreme Court, his conviction became "final" for purposes of § 2255(f)(1), at "the expiration of time to file a petition for a writ of certiorari (or, if certiorari is sought and denied, on the date of denial)." *Latham v. United States*, 527 F.3d 651, 651 (7th Cir. 2008) (citing *Clay v. United States*, 537 U.S. 522 (2003)). Under this formula, D'Antoni's conviction became final in 1993, well before AEDPA and its statute of limitations went into effect on April 24, 1996. As a result, D'Antoni had a "grace period" of one year, up to and including April 24, 1997, to challenge his conviction and sentence under § 2255. *Noland v. United States*, 358 F.3d 480, 484 (7th Cir. 2004) (citing *Newell v. Hanks*, 283 F.3d 827, 833 (7th Cir. 2002)); *United States v. Marcello*, 212 F.3d 1005, 1009 (7th Cir. 2000). D'Antoni's pending motion exceeds that grace period by more than 13 years.

D'Antoni makes no case for equitable tolling of the limitations period. Instead, D'Antoni argues that his motion is timely because his claim for relief is based on the

[1] If there was a defect of notice, D'Antoni could have raised this claim on direct appeal. Noting that D'Antoni did not raise his claim on direct appeal, the government observes correctly that review is barred by the doctrine of procedural default. *See United States v. Ceballos*, 302 F.3d 679, 692 (7th Cir. 2002). D'Antoni does not articulate any cause for his default, nor does he show that a fundamental miscarriage of justice will result in this instance because, as the PSR reflects, D'Antoni was advised of the enhanced sentencing range and afforded an opportunity to object before his sentence was imposed. Because his motion is barred by the governing statute of limitations, however, the court does not address this alternative argument further.

Supreme Court's recent decision in *Carachuri-Rosendo v. Holder*, — U.S. —, 130 S. Ct. 2577 (2010). D'Antoni contends that this case triggered a new one-year statute of limitations period, which began to run under 28 U.S.C. § 2255(f)(3) from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Unfortunately for D'Antoni, the right recognized in *Carachuri-Rosendo* does not apply to him.

Carachuri-Rosendo arose from a removal proceeding under the Immigration and Nationality Act (INA). Although the defendant had a prior drug conviction, the Supreme Court considered whether a permanent resident alien was entitled to relief in the form of cancellation of removal because he was convicted of a state-court misdemeanor that could not be considered an "aggravated felony" in the immigration context. 130 S. Ct. at 2589. For a state-court conviction to qualify as an aggravated felony, so as to preclude cancellation of removal under the INA, 8 U.S.C. § 1229b(a)(3), the underlying conduct must be punishable as a federal felony. *Id.* at 2582-83 (citing *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006)). The Court held that, "when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been 'convicted' under [8 U.S.C.] § 1229b(a)(3) of a 'felony punishable' as such [under the Controlled Substances Act, 18 U.S.C. § 924(c)(2)]." *Carachuri-Rosendo*, 130 S. Ct. at 2586-89.

Unlike the petitioner in *Carachuri-Rosendo*, however, the predicate conviction that resulted in the enhanced statutory range of imprisonment in D'Antoni's case was a

federal drug offense. D'Antoni argues, nevertheless, that *Carachuri-Rosendo* contains a "new" rule that authorizes a challenge to his conviction under the limitations period found in § 2255(f)(3). In support of his argument, D'Antoni points to portions of the decision in which the Supreme Court observed that defendants who are charged as recidivists under the Controlled Substances Act, 18 U.S.C. § 924(c)(2), must receive notice under 21 U.S.C. § 851(a) and an opportunity to object before receiving an enhanced sentence. *See Carachuri-Rosendo,* 130 S. Ct. at 2582, 2588. D'Antoni interprets this language to mean that his 1991 federal conviction for conspiracy to possess and distribute LSD could not have been enhanced by his prior 1987 federal conviction for distribution of cocaine because he did not receive notice of the potential enhancement in compliance with 21 U.S.C. § 851(a).

Once a conviction becomes final, courts typically are prohibited from retroactively applying "new" rules propounded by the Supreme Court. *Teague v. Lane*, 489 U.S. 288, 300-01 (1989). A new rule applies retroactively in collateral proceedings only if (1) it is substantive, meaning that "it places primary conduct outside the reach of the criminal sanction"; or (2) it is a "'watershed rul[e]' of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Gonzalez v. Chandler*, 492 F.2d 863, 866 (7th Cir. 2007) (quoting *Saffle v. Parkes*, 494 U.S. 484, 495 (1990) (citation omitted)). For purposes of these narrow exceptions, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. Stated differently, "a case announces a new rule

if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id*. (emphasis in original).

As explained earlier, however, the notice requirement found in 21 U.S.C. § 851(a) was in place at the time of D'Antoni's trial and is not new. Likewise, the language that he emphasizes does not form part of the Supreme Court's holding. As such, he cannot establish that this language is a new rule of constitutional proportion. *See Tyler v. Cain*, 533 U.S. 656, 668 (2001) ("It is only through the holdings of [the Supreme Court], as opposed to this Court's dicta and as opposed to the decisions of any other court, that a new rule [can be made retroactive]."); *see also Henderson v. Morgan*, 426 U.S. 637, 651 (1976) ("[N]ew rules of constitutional law are not established in dicta in footnotes") (White, J., concurring); *Klingman v. Levinson*, 114 F.3d 620, 628 (7th Cir. 1997) (observing that statements not essential to a court's holding are dicta). Thus, D'Antoni does not establish that *Carachuri-Rosendo* announced a new rule of the sort that would apply to his benefit at this late date.[2]

Because the portion of *Carachuri-Rosendo* that D'Antoni points to does not recognize a new rule made retroactively applicable to cases on collateral review, D'Antoni cannot rely on this precedent to circumvent the one-year statute of limitations on review

[2] Many other courts have found that *Carachuri-Rosendo* is not retroactive and does not apply to cases on collateral review. *See, e.g., United States v. Powell*, 691 F.3d 554, 559-60 (4th Cir. 2012) (holding that *Carachuri-Rosendo* is not retroactively applicable to cases on collateral review"); *Stewart v. Warden, FCC Coleman-Low*, 2011 WL 6004594 (M.D. Fla. 2011) (same); *Bogardus v. United States*, 2012 WL 292870, at *6 (S.D. Ga. Jan. 4, 2012) (collecting cases holding same); *Gaytan-Gonzalez v. Benov*, 2012 WL 28625 (E.D. Cal. Jan. 5, 2012) (same); *United States v. Stallworth*, 2012 WL 512644 (N.D. Fla. Jan. 26, 2012) (same); *United States v. St. Clair*, 2012 WL 1309368, at *3 (W.D. Pa. April 16, 2012); *McCall v. United States*, 2012 WL 5995535, at *2 (W.D.N.C. Nov. 30, 2012) (same).

of his conviction under 28 U.S.C. § 2255(f)(1). As a result, D'Antoni's motion must be denied as untimely.

A defendant may not appeal from a final order in a proceeding under 28 U.S.C. § 2255 without a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). Rule 11 of the Rules Governing Section 2255 Cases in the United States District Courts requires that, when ruling against an applicant for relief, the court must decide whether a certificate of appealability is warranted. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a district court denies relief on procedural grounds, an applicant may obtain a certificate of appealability only if he shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Although Rule 11 allows the court to direct the parties to submit arguments on the possible issuance of a certificate of appealability, it is unnecessary to do so in this instance. For reasons stated above, the court concludes that no reasonable jurist would question whether D'Antoni's motion is barred by the governing statute of limitations. For this reason, a certificate of appealability will not issue.

ORDER

IT IS ORDERED that the motion filed by Todd A. D'Antoni under 28 U.S.C. § 2255 (Dkt. #1) is DENIED because it is barred by the statute of limitations and this

case is DISMISSED with prejudice. In addition, a certificate of appealability is DENIED.

Entered this 27th day of December 2012.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge